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### Possession: A Brief for Louisiana's Rights of Succession to the Legacy of Roman Law

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# POSSESSION: A BRIEF FOR LOUISIANA'S RIGHTS OF SUCCESSION TO THE LEGACY OF ROMAN LAW

DAVID V. SNYDER\*

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## I. INTRODUCTION

The phrase "Roman law" conjures warm images in the mind of every true civilian believer. The greatest possible attainment of a medieval jurist—becoming a *doctor utriusque iura* (doctor of both laws, canon and secular, Christian and Roman)—has been replaced by learning in both ancient and modern law. Modern scholars are excited when they see vestiges of Roman law in modern codes. When such vestiges are discov-

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ered, grand civilian pretensions to being heirs to the Roman law are legitimized.

The law relating to possession in the Louisiana Digest of 1808, commonly called the Civil Code of 1808,<sup>1</sup> affords Louisiana a serious claim as a middle-aged pretender. Concededly, the Code is heavily influenced by Spanish law; Louisiana had been a Spanish colony only a few years earlier. Louisiana also had been a French colony for some time, and the influence of French law was strong too. The Code of 1808 was written shortly after the Code Napoléon of 1804, and the Louisiana legislation took advantage of the work done by the French redactors.<sup>2</sup> There has been a great deal of debate over the relative influence of the French and Spanish sources on the Code of 1808,<sup>3</sup> but that dispute is of relatively little concern here. In the area of possession, Louisiana followed Rome, not Spain or France.

Both the French and the Spanish have their own pretensions to the heirship of Rome, and Louisiana's claim would be tarnished if it admitted receiving the Roman law via those intermediate sources. Through the possession articles, Louisiana can make the case that it took in its own right from Rome. Proving that case is the purpose of this Article. The argument will be made in three parts.

First, a close textual analysis of the articles in the Code of 1808 and the parallel provisions of the Institutes of Justinian

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1. This Article will refer to this source as the Code of 1808, following general usage.

2. The essential dates in early Louisiana history can be summarized as follows: In 1682, Robert Cavalier, Sieur de La Salle claimed Louisiana on behalf of France. New Orleans was founded in 1718, and Louisiana became a French crown colony in 1731. France transferred Louisiana to Spain by the Family Compact of the secret Treaty of Fontainebleau in 1762, although the Spanish did not take possession until 1769. Louisiana remained Spanish until 1800, when it was transferred back to France. This time the French were delayed in taking possession; France ruled Louisiana for only twenty days in 1803, when Louisiana was sold to the United States as part of the Louisiana Purchase. In 1812, Louisiana was admitted as a state in the Union. See, e.g., Rodolfo Batiza, *Origins of Modern Codification of the Civil Law*, 56 TUL. L. REV. 477, 579-82, 589 (1982); A.N. Yiannopoulos, *The Civil Codes of Louisiana*, in LA. CIV. CODE at xxiii-xxvii (West 1992).

3. Compare Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971) [hereinafter Batiza, *Actual Sources*] and Rodolfo Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TUL. L. REV. 628 (1972) with Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). For additional discussion, see Joseph M. Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972); Yiannopoulos, *supra* note 2, at xxiii, xxvii-xxx. See also A REPRINT OF MOREAU LISLET'S COPY OF A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (photo. reprint 1971) (1808 de la Vergne volume).

(which are largely taken from Gaius<sup>4</sup>) reveals that the Code tracks the Institutes. The *Siete Partidas* also follow the Institutes, and the question arises whether Louisiana received its Roman law in this area through the *Siete Partidas* or from the Institutes themselves. The conclusion is that the Louisiana redactors<sup>5</sup> may have consulted the Spanish law, but they did not always elect to follow it and instead chose to follow the Institutes directly. Louisiana wins its claim by a preponderance of the evidence in the first phase of its case.

In the second phase, this Article explains the rudiments of the Roman law of *possessio*, including possessory protection in the form of *interdicta*, as well as modes of acquiring ownership, such as *usucapio* and *occupatio*.<sup>6</sup> As these concepts are explained, their Louisiana counterparts will be examined for similarities, or actual copying. This exposition will set the stage for the third phase of the argument, which will show how the basic understanding of possession in Louisiana law, particularly under the Code of 1808 and the Code of Practice of 1825,<sup>7</sup> followed traditional Roman thinking when addressing problematic issues of possession law. The conclusion is that Louisiana can claim to take from the Roman tradition in its own right, at least in the area of possession law. While in other areas the State must claim through the French or the Spanish, in the field of possession its claim is equal to the claims of France and Spain.

Before the argument itself can begin, some basic concepts need to be defined. The word "possession" is used in a number of senses under the current Louisiana regime<sup>8</sup> and under older regimes in Louisiana and other jurisdictions. A person might be said colloquially to "possess" a book borrowed from the library, but that person would not possess the book in the proper, juridi-

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4. See, e.g., W.M. Gordon & O.F. Robinson, *Introduction to THE INSTITUTES OF GAIVS 7, 14* (W.M. Gordon & O.F. Robinson trans., 1988). For instance, the provisions of Justinian concerning the *occupatio* of wild animals, see Table *infra*, are taken from G. Inst. 2.67.

5. The redactors of the Code of 1808 were James Brown and Louis Moreau Lislet, and the redactors of the Code of Practice of 1825 were Moreau Lislet, Pierce Derbigny, and Edward Livingston. See Yiannopoulos, *supra* note 2, at xxvii, xxxi.

6. For the sake of distinguishing verbally between the Roman law and later law, this Article will use Latin terms when they are not overly burdensome (i.e., when the Latin words are cognates with English). For instance, when referring to the Roman law of possession, the word "*possessio*" will be used.

7. The history of the various civil codes of Louisiana has been amply discussed elsewhere. See generally Yiannopoulos, *supra* note 2 (collecting and discussing authorities).

8. See A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 523-24 (1991).

cal sense. Used in its proper sense, "possession" means the exercise of physical control over a thing<sup>9</sup> with the requisite intent—such as the intent to own the thing. The "possessor" of the library book is not a possessor in the proper sense because the intent element is missing: he exercises physical control over the book because he has borrowed it, not because he has any pretense to having it for himself.

Exactly what intent is required at Roman law is the subject of some controversy, and this issue will be addressed below.<sup>10</sup> Some element of intent was certainly required; the only question is the quality of the intent. Exercise of physical control without the requisite intent is mere "detention." This Article will attempt to use these terms strictly, although the law itself sometimes confuses the concepts, leading to potential confusion in interpretation.

Further, the reader should not confuse ownership and possession. According to Ulpian's ancient Roman maxim, "Ownership has nothing in common with possession."<sup>11</sup> This is perhaps an overstatement and should not be taken literally, but the two concepts are nevertheless separate. The Louisiana redactors understood this, stating in the Code of 1808:

Although the possession be naturally linked with the <ownership>, yet they may subsist separately from each other, for it often happens that the <ownership> of a thing being controverted between two persons, there is one of the two who is <recognized> to be possessor, and it may be that it is the person who is not the right owner, and that thus the possession may be separated from the <ownership>.<sup>12</sup>

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9. "Thing" is a technical legal term. A "thing" for the purposes of this Article may be defined simply as something that can be the subject of property rights.

10. See *infra* section III.C.1.

11. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 107 (1962).

12. LA. CIV. CODE art. 3.20.20 (1808). The words in angle brackets are my translation of the official French, for "*propriété*" and "*reconnue*." I translate them as "ownership" and "recognized," respectively. The official English translation uses "property" and "owned," respectively, which is possibly inaccurate in twentieth-century English, and certainly confusing. I believe my translation is just as appropriate, if not more so. See CENTRE DE RECHERCHE EN DROIT PRIVÉ & COMPARÉ DU QUÉBEC, LEXIQUE DE DROIT PRIVÉ 49 (1988).

I have used angle brackets throughout this Article to give more appropriate translations than appear in the official English version. Translations of early Louisiana law from French into English are notoriously inadequate. The French in these early laws is controlling when the English is incorrect. See, e.g., *Shelp v. National Sur. Corp.*, 333 F.2d 431, 437-38 (5th Cir.) (Wisdom, J.) (translations were "spectacularly bad"), *cert. denied*, 379 U.S. 945 (1964).

Possession sometimes can lead to ownership through means such as *occupatio*, *praescriptio*, or *usucapio*. The relation of possession to ownership is important, but it is only a relation; the two are not identical. *Praescriptio* and *usucapio* will be discussed below.<sup>13</sup> Likewise, *occupatio*, although it is an outgrowth of possession, is a means of acquiring ownership. It is intimately related to possession, however, and this Article will treat the subject in some detail, particularly because the similarity in language of the Roman and Louisiana law is so striking.

## II. TEXTUAL ANALYSIS AND COMPARISON

The most obvious way in which the early Louisiana law of possession is heir to the Roman law is in the language of some of the provisions of the Code of 1808. This Part of the Article exposes this language as it compares with older Roman sources. The following Table lists some of the parallel articles of the Louisiana Code of 1808 (on the left) and of the Institutes of Justinian (on the right), which date from the sixth century of the Common Era.<sup>14</sup> When the provisions are seen side by side, the influence of the Institutes is dramatic.

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13. See *infra* section III.B.3.

14. The following provisions are from LA. CIV. CODE arts. 3.20.4-.6, .8-.9, .13 (1808), and J. INST. 2.1.12, .15-.16, .18, .48. The translations for Justinian's Institutes throughout this Article will be from the 1987 edition of Peter Birks and Grant McLeod, unless otherwise noted. When the original French or Latin indicates a less-than-perfect translation or shows a closer parallel between the two texts, the relevant original language is shown parenthetically.

TABLE OF SOME CORRESPONDING PROVISIONS IN THE  
LOUISIANA CODE OF 1808 AND THE INSTITUTES OF  
JUSTINIAN

Code of 1808

Art. 4. Wild beasts, birds and all the animals which are bred in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly by the law of nations, the property of the captor; for it is agreeable to natural reason, that those things which have no owner, should become the property of the first occupant.

And it is not material whether they are taken by a man upon his own ground or upon the ground of another. But yet it is certain that whoever has entered into the ground of another for the sake of hunting or fowling, might have been prohibited from entering by the proprietor of the ground if he had foreseen the intent.

Wild beasts are those who enjoy their natural liberty and go wherever they please.

Art. 5. Wild beasts and fowls when taken are esteemed to be the property of the captor as long as they continue in his custody but when they have once escaped and recovered their natural liberty, the right of the captor ceases and they become the property of the first who seizes them:

Justinian's Institutes

12. Wild animals, birds and fish, the creatures of land, sea and sky, become the property of the taker as soon as they are caught. Where something has no owner, it is reasonable that the person who takes it should have it.

It is immaterial whether he catches the wild animal or bird on his own land or someone else's. Suppose a man enters someone else's land to hunt or to catch birds. If the landowner sees him, he can obviously warn him off.

If you catch such an animal it remains yours so long as you keep it under your control. If it escapes your control and recovers its natural liberty, it ceases to be yours. The next taker can have it.

and they are understood to have recovered their natural liberty, if they have run or flown out of sight, and even if they are not out of sight, when it happens that they cannot without difficulty, be pursued and retaken.

Art. 6. Peacocks and pigeons are considered as wild beasts, though after every flight it is their custom to return;

and with regard to these animals which go and return customarily, the rule to be observed is that they are understood to be yours as long as they appear to retain an inclination to return: but if this inclination ceases, they cease to be yours and will again become the property of them who take them.

And these animals seem then to cease to have an inclination to return when they disuse of returning during a certain time (*lorsqu'ils ont cessé de revenir pendant un certain tems* [sic]).

. . . .

It is held to have regained its natural freedom when it is out of your sight or when, though still in sight, it is difficult for you to reach it.

. . . .

15. Peacocks and pigeons are wild by nature. It is immaterial that their habit is usually to keep flying off and coming back. Bees do that too and there is no doubt that they are wild. Some people also keep deer so domesticated that they regularly go back and forth to the woods. Nobody suggests that they are not wild by nature.

There is a special rule for these animals which come and go: they stay yours so long as they keep their homing instinct. It is only when they lose it that they stop being yours. They then vest in the next taker.

They are judged to lose the homing instinct when they stop coming back.



Art 8. Chickens, turkeys, geese, ducks and other domestic animals, shall not be considered as wild beasts, though there are species of these animals which exist in a state of natural liberty.

Therefore if the geese or fowls of any body, should take flight, they are nevertheless reckoned to belong to him, in whatever place they are found although he shall have lost sight of them; and whoever detains such animals, with a lucrative view, is understood to commit a theft.

Art. 9. Those who discover or who will find precious stones, pearls and other things of that kind on the sea shore, or other places where it is lawful for them to search for them and to take them, become masters of them.

....  
Art. 13. We must not reckon in the number of things relinquished, those which one has lost, nor that which is thrown into the sea, in a danger of shipwreck, to save the vessel, nor those which are lost in a shipwreck. For although the owners of these things lose the possession of them, yet they retain the <ownership> and the right to recover them (*car encore, qui les maîtres de ces effets en perdent la possession, ils en conservent la propriété, et le droit de les recouvrer*).

16. Ducks and geese are not wild by nature. That is apparent from the existence of separate wild species.

If your ducks or geese are disturbed and fly off, they stay yours wherever they are, even when out of your sight.

Anyone who takes such animals with intent to gain commits theft (*et qui lucrandi animo ea animalia retinet, furtum committere intellegitur*).

....

18. Stones and gems and so on found on the sea-shore immediately become the finder's by the law of nature.

....

48. It is different with things thrown overboard in a storm to lighten ship. They continue to belong to their owners. They are definitely not thrown away with the intention to be rid of them but to help both owner and ship escape the dangers of the sea.

Thus those who find things of this kind, cannot make themselves masters of them, but are obliged to restore them to their lawful owners in the manner provided for by the special laws made on that subject.

Anyone who finds them driven ashore by the waves or still on the sea commits theft if he takes them with intent to gain. Such things are in much the same position as those which drop out of moving vehicles without their owners' knowledge.

The construction of these provisions demonstrates the influence of the Roman law of *occupatio* on the early Louisiana law of occupancy.<sup>15</sup> The question remains, however, whether the Roman law was received into Louisiana through the filters of other intermediate laws, promulgated between ancient times and the nineteenth century. French and Spanish sources are the two chief contenders for the honor of being the transmitter of Roman law. Each will be examined in turn.

The chief advocate for the French has been Professor Batiza.<sup>16</sup> Even he has not found French sources for most of the

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15. A few asides about the provisions reproduced above are in order here. The law of physical things (or property) is separate under the Roman (and Louisiana) scheme from the law of obligations. While a landowner may have no action under a property theory against another who kills game on his land, the hunter may have committed a delict, and the landowner could recover under that theory. The point of the property law is that the hunter would gain title to the wild animal through *occupatio* or occupancy, unless the landowner had reduced the wild animal to possession (e.g., by putting it in a pen). NICHOLAS, *supra* note 11, at 131. But see FRIEDRICH K. VON SAVIGNY, *DAS RECHT DES BESITZES: EINE CIVILISTISCHE ABHANDLUNG* (7th ed. Vienna Gerold's sohn 1865). One of the chief theses of Savigny's treatise is that the law of possession is part of the law of obligations. His theory is that possessory protection was based on the possessory interdict, which was based on a delictual obligation of the person who disturbed or evicted the possessor by "an illegal act in point of form." SAVIGNY, *TREATISE ON POSSESSION OR THE JUS POSSESSIONIS OF THE CIVIL LAW* 6-7, 21-23 (Erskine Perry trans., 6th ed. London, S. Sweet 1848) [hereinafter SAVIGNY]. Perry's translation will be used throughout this Article instead of the original German version.

J. INST. 2.1.13, which is omitted above, is a didactic provision. Justinian's Institutes were intended to be a course book for law students. Thus, the Louisiana redactors may have declined to include a provision such as this one. It reads:

Does an animal become yours when it is wounded and ready to be caught? Some jurists thought it became yours at once and stayed yours till you gave up the chase, only then becoming available again to the next taker. Others thought that it became yours only when you caught it. We confirm that view. After all, many things can happen to stop you catching the animal.

Anyone with an interest in the Roman law concerning this particular subject should see generally Grant McLeod, *Wild and Tame Animals and Birds in Roman Law*, in *NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY* 169 (Peter Birks ed., 1989).

16. See sources cited *supra* note 3.

articles quoted above.<sup>17</sup> What Professor Batiza did find was that the French *Projet* of the Year VIII<sup>18</sup> was a "substantial influence" on article 13, as was the corresponding article of the Code Napoléon, article 717.<sup>19</sup> That the Louisiana redactors followed Justinian's legislation instead of the French, however, can be seen from reading article 717 of the Code Napoléon: "Claims respecting property thrown into the sea, respecting objects which the sea casts up, of whatever nature so ever they may be, over plants and herbage which grow on the banks of the sea, are also regulated by particulr [sic] laws."<sup>20</sup> The structure and language of the Louisiana article in the 1808 Code match the Institutes much more closely than they approximate the article in the Napoleonic Code.

The other possible French influence on the above-quoted articles is Pothier. According to Professor Batiza, Pothier had an influence on articles 2 and 3 of the 1808 Louisiana Code. The cited provision of Pothier states:

Occupancy is the title by which one acquires ownership of a thing that belongs to no one, when one lays hold of it with the idea of acquiring it.

We will see, in a first article, which are the things that belong to no one, ownership of which may be acquired by the first taker; we will see shortly the different types of occupancy, which are hunting, fishing, fowling, invention, and simple occupancy.<sup>21</sup>

The second paragraph just quoted does appear to have influ-

17. See Batiza, *Actual Sources*, *supra* note 3, at 130.

18. *Id.* (construing *Projet de Code Civil*, présenté par la Commission nommée par le gouvernement le 24 Thermidor, an VIII, art. II, penultimate para. (1800)).

19. *Id.*

20. CODE NAPOLÉON art. 717, ¶ 1 (1804).

21. ROBERT J. POTHIER, *TRAITÉ DU DROIT DU DOMAINE DE PROPRIÉTÉ* P. 1, 2, § 1, n.20, 18 (nouvelle ed. 1807) (citations omitted) (my translation). The full text of this note in French is as follows:

*L'occupation est le titre par lequel on acquiert le domaine de propriété d'une chose qui n'appartient à personne, en s'en emparant dans le dessein de l'acquérir: Quod enim nullius est, dit Gaius,—id ratione naturali occupanti conceditur. L. 3, ff. de acq. rer. Dom.*

*Nous verrons, dans un premier article, quelles sont les choses qui n'appartiennent à personne, dont le domaine de propriété peut être acquis par le premier occupant; nous parcourrons ensuite les différentes espèces d'occupations, qui sont la chasse, la pêche, l'oïsellerie, l'invention et l'occupation simplement dite.*

*Comme la chasse mérite un article particulier, elle fera la matière du second article; nous traiterons de la pêche et de l'oïsellerie dans un troisième; dans un quatrième, de l'invention; dans un cinquième, de l'occupation simplement dite.*

*Id.* I regret not having access to the second edition of Pothier from 1781, cited by Profes-

enced article 3 of the 1808 Code, which states: "[T]here are five ways of acquiring <ownership> by occupancy, to wit: By hunting; By fowling; By fishing; By invention (finding) that is by discovering precious stones on the seashore or things abandoned or a treasure; By captures from the enemy."<sup>22</sup> Pothier is an undoubtedly important influence on the 1808 Code.<sup>23</sup> But Pothier, at least for a number of other articles, is not the main transmitter of the Roman tradition for the occupancy articles in the Louisiana Civil Code of 1808. The redactors must have relied on the Institutes directly, or on some other source. The French claim as intermediary is weak in the area of possession.

Having disposed of the French claims, Louisiana must next address the stronger Spanish claim. Batiza notes that the *Siete Partidas* were a "substantial influence"<sup>24</sup> on some of the same articles of the 1808 Code that appear to follow Justinian's Institutes. For instance, as shown in the Table above, article 3.20.4 of the 1808 Code is largely a verbatim translation of Justinian's Institutes 2.1.12. Yet article 3.20.4 also resembles a provision of the *Siete Partidas*:

Wild beasts, and birds, the fish of the sea and rivers, become the property of him who catches them, as soon as they are in his possession, whether he took them on his own, or on another's estate. Yet when any one is about to enter upon the estate of another to hunt, and finds the owner there, who forbids him to enter for that purpose; if he nevertheless enters and catches game; it will not belong to the hunter, but to the owner of the estate. For no man has a right to enter upon the lands of another, to hunt, or for any other purpose, when he is forbidden by the owner. And so it would be, if the owner had found him already hunting upon his estate, and forbid him to hunt

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sor Batiza, particularly because that edition might have been the one used by the redactors of the Code of 1808.

22. LA. CIV. CODE art. 3.20.3 (1808). The French version reads: "*Il y a cinq manières d'acquérir ainsi par occupation, savoir: La chasse aux bêtes fauves; La chasse à l'oiseau; La pêche; L'invention, c'est-à-dire, lorsqu'on trouve des perles sur le bord de la mer, des choses abandonnées, ou un trésor; Le butin que l'on fait sur les ennemis.*" *Id.*

23. Pothier, as well as Domat, had an impact on many possession articles not under discussion in this paper because they are not part of the direct Roman influence. See Batiza, *Actual Sources*, *supra* note 3, at 130-33. See generally 1 JEAN DOMAT, *LES LOIX CIVILES DANS LEUR ORDRE NATUREL*, (Paris, Durand 1777); ROBERT J. POTHIER, *TRAITÉ DE LA POSSESSION* (nouvelle ed. 1807); ROBERT J. POTHIER, *TRAITÉ DE LA PRESCRIPTION QUI RÉSULTE DE LA POSSESSION* (nouvelle ed. 1807); POTHIER, *supra* note 21. Again, I regret not having access to any of the second editions of Pothier from 1781. See *supra* note 21.

24. Batiza, *Actual Sources*, *supra* note 3, at 130.

there any more: for all the game he might afterwards take, would belong to the owner and not to him. But if before he had been thus forbidden by the owner, he had taken any game, it would belong to him, and the owner would have no claim whatever to it.<sup>25</sup>

While the resemblance between this law of the *Siete Partidas* and the corresponding Louisiana article is apparent, the purpose of the law in the *Siete Partidas* is different. Instead of appearing under the title on possession or occupancy, it is part of the title "Of the Dominion of Things." Its chief concern is ownership of the land, and the rights of the landowner, rather than the rights of the person attempting to gain ownership of game through possession under the laws of occupancy. Because the redactors of the 1808 Code focused article 3.20.4 on possession and occupancy, rather than the rights of the landowner, it seems safe to conclude that they used Justinian's Institutes as the source for the article, instead of law 17. The redactors may have looked at the provision in the *Partidas*, but in the end they chose to follow Rome rather than Spain.

In other provisions of the *Siete Partidas*, however, the Spanish follows the language and the purpose of the Roman law more closely. Law 19 provides, under the title "How a man loses the dominion or property he has in birds and wild beasts," as follows:

A man loses the dominion of property he had acquired in birds, wild beasts, and fish, in the manner mentioned . . . immediately they escape from his power and return to the state in which they were before taken: or when they go off so far as not to be seen; or if seen, are so far off, as not to be retaken without difficulty. In either of these cases, they will become the property of him who first takes them.<sup>26</sup>

This provision looks almost exactly the same as both the corresponding article in the Code of 1808 and the corresponding sec-

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25. 1 LAS SIETE PARTIDAS, partida third, tit. XXVIII, law 17 (L. Moreau Lislet & Henry Carleton trans., New Orleans, James McKarahr 1820). This translation was commissioned by the Louisiana Legislature because a large portion of the *Siete Partidas* was in force in Louisiana at the time. *Id.* at iii (citing Act of Mar. 3, 1819, reprinted in SYMEON SYMEONIDES, AN INTRODUCTION TO THE LOUISIANA CIVIL LAW SYSTEM 189-90 (4th ed. 1988)). The relevant provisions of the *Siete Partidas* appear in the Spanish in 2 LAS SIETE PARTIDAS DEL SABIO REY (photo. reprint 1974) (Gregorio Lopez ed., Salamanca 1555) [hereinafter the SIETE PARTIDAS will be cited simply as SIETE PARTIDAS, followed by the appropriate partida, title, and law numbers].

26. SIETE PARTIDAS, *supra* note 25, partida third, tit. XXVIII, law 19.

tion in the Institutes. The source of these laws in the *Siete Partidas* is the same as that of the 1808 Code, and in some instances, the *Siete Partidas* track the Roman law more closely than the Louisiana law does. For example, the Institutes state:

Bees are . . . wild by nature. If they swarm in your tree they are not yours till you manage to contain them. They are in the same position as birds nesting in the same tree. If another person hives them, he becomes their owner. Also, anyone can take their honey, if they have made any. If you see someone coming on your land, you can obviously stop him before anything is done. A swarm which leaves your hive remains yours while it is within your sight and can be followed without difficulty. Otherwise someone else can take it.<sup>27</sup>

The parallel law in the *Siete Partidas* provides:

Bees are considered as naturally wild. We therefore say, that though a swarm of them, light upon a tree belonging to any person, yet he cannot say they are his own, until he has confined them in a hive, or other thing. And so it would be with birds that light there; he could not claim them, until he had caught them. And so we say it would be with the honeycomb which bees make upon a tree belonging to any person, it would not, on that account, belong to him, until he had taken possession of it, and conveyed it away. For if any other person come first, and take it away, it will belong to him; unless the owner of the tree were present when he came and forbade him. We also say, that if a swarm of bees fly away from a man's hive, so that he lose sight of them; or if they go to so great a distance, that he can neither retake nor follow them; he will then lose his property in them and they will belong to the first person who takes and confines them.<sup>28</sup>

The Louisiana law entirely omits this intricate discussion of bees and their honey.<sup>29</sup> And while the *Siete Partidas* provide for hens, capons, cows, ewes, mares, and she-asses,<sup>30</sup> both the Institutes and the 1808 Code ignore these animals. The Louisiana

27. J. INST. 2.1.14.

28. SIETE PARTIDAS, *supra* note 25, partida third, tit. XXVIII, law 22.

29. Despite the omission from the Louisiana law, bees seem to hold a curious fascination for civilian lawyers. See, e.g., E.J. Cohn, *Bees and the Law*, 55 L.Q. REV. 289, 289 (1939) ("[F]ew animals are more prone than bees to furnish lawyers with attractive little problems . . ."), quoted in Bruce W. Frier, *Bees and Lawyers*, 78 CLASSICAL J. 105, 105 (1983). In Europe, honey was of great importance as a source of sugar. The Louisiana redactors probably did not consider it so significant because sugar, from sugar cane, was readily available in Louisiana after the middle of the eighteenth century. See, e.g., W.E. BUTLER, *DOWN AMONG THE SUGAR CANE* 6 (1980).

30. SIETE PARTIDAS, *supra* note 25, partida third, tit. XXVIII, laws 24-25.

redactors must have followed the Institutes primarily, perhaps looking secondarily to the *Siete Partidas*, which also followed the Institutes. The drafters of the *Siete Partidas* (allegedly Alfonso the Wise) copied the Institutes, sometimes adding substance that the Institutes did not have.<sup>31</sup> Similarly, the Louisiana redactors appear to have looked to and copied the Institutes, leaving out some parts, just as they may have consulted and left out parts of the *Siete Partidas*. But the redactors did look to the Institutes directly. They did not merely receive the substance of the Roman law through the prism of the *Siete Partidas*.

The direct reliance of the Louisiana redactors is shown by the following passage from the *Siete Partidas*. In addition to adding animals not treated by the Institutes, this provision of the *Siete Partidas* departs markedly, perhaps even substantively, from the Roman law governing peacocks and geese. In fact, the Spanish law legislates the opposite presumptions and consequences from the Roman law:

Men sometimes tame and rear about their houses, peacocks, sparrow hawks, hens, pigeons, crows, geese, and pheasants, and other birds wild by nature, wherefore we say, that the person who reared them will retain his property in them, wherever they may go, as long as they are accustomed to go and return to his house: but as soon as they lose the habit of going and returning, he will lose the property in them, and it will be acquired by the first person who takes them. And so we say of stags and does, of zebras and other wild beasts which men had reared about their houses: for immediately they return to the woods, and cease to come to the house or place where they were kept by their owner, he will lose the property in them.<sup>32</sup>

That the 1808 Code follows the Roman rather than the Spanish law helps secure Louisiana's claim to direct Roman heirship. Spanish law adds animals not included in the Roman law—animals that the Louisiana redactors chose to ignore. The Spanish law likens geese to animals that are "wild by nature," but the Louisiana and Roman law say the opposite.<sup>33</sup> The Spanish law lumps peacocks and pigeons with geese, but the Roman and

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31. Compare J. INST. 2.1.14 with SIETE PARTIDAS, *supra* note 25, partida third, tit. XXVIII, law 22.

32. SIETE PARTIDAS, *supra* note 25, partida third, tit. XXVIII, law 23.

33. "Ducks and geese are not wild by nature." J. INST. 2.1.16. "[G]eese, ducks and other domestic animals, shall not be considered as wild beasts." LA. CIV. CODE art. 3.20.8 (1808).

Louisiana provisions use these birds to distinguish<sup>34</sup> different species.<sup>35</sup> This Article does not argue that these differences are of earth-shattering importance in Louisiana law, or Roman or Spanish law. But the presence of these differences is significant. When Louisiana could have followed the *Siete Partidas* blindly, the redactors decided instead to look directly to the Roman source.

Substantively, in fact, the laws of Spain and the laws of the early Louisiana territory may not have been terribly different. The next law in the *Siete Partidas* is probably meant to have a meaning similar to the provisions in Justinian's Institutes. The *Partidas* read:

Hens, capons, and geese, which are hatched and reared about a man's house, are not wild in their nature. Wherefore we say, that though they fly and wander away from the houses of those who reared them, through fear or otherwise, and do not return; nevertheless the owner does not lose his property in them: but he may, on the contrary, claim them by action of theft of any person who takes them, with an intention of depriving him of them, in the same manner he could any thing else stolen from his house.<sup>36</sup>

This provision apparently attempts to follow the Justinian legislation, but it is more confusing and less direct than the Institutes. It introduces a criterion (being "reared about a man's house") not contained in the Institutes, and uses this test to distinguish the geese in this law from the geese in the preceding law. This departure in method shows again that the Louisiana Code, in method as well as in language, follows the Roman law more closely than the *Siete Partidas* does, and that the Louisiana redactors must have used the Roman law as a direct source for the 1808 Code.

Further Roman influence on the 1808 articles will be shown below.<sup>37</sup> Because the texts are not linguistically as similar as

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34. Compare LA. CIV. CODE art. 3.20.8 (1808) with J. INST. 2.1.15; compare LA. CIV. CODE art. 3.20.15 (1808) with J. INST. 2.1.16.

35. Under Roman law, and its progeny, whether an animal was wild was generally determined by its species, not the individual animal. NICHOLAS, *supra* note 11, at 131. There were exceptions for animals that were wild by nature but who might have the *animus revertendi* (the intent to return, or homing instinct). See J. INST. 2.1.15; G. Inst. 2.68; NICHOLAS, *supra* note 11, at 131.

36. SIETE PARTIDAS, *supra* note 25, partida third, tit. XXVIII, law 24.

37. A brief discussion of the background in which these doctrines developed must be given first.



those quoted above, they will be treated under the discussion of the parallels between the general possession law of Rome and Louisiana.

### III. SOME PERTINENT ASPECTS OF THE ROMAN LAW OF POSSESSION COMPARED WITH THEIR COUNTERPARTS IN LOUISIANA LAW

#### A. *Painting a 2000-Year Backdrop*

So far, a close reading of parallel texts of Roman, Louisiana, French, and Spanish law has highlighted the similarities and the differences among them. Correlations in language, method, and perhaps substance between Roman and Louisiana law, and the discrepancies between Roman law and French and Spanish law, have shown that Louisiana took much of its law of occupancy directly from Roman sources. Thus far, deep understanding of the law of possession has not been necessary. The textual analysis from the preceding part of this Article, however, is not adequate to appreciate the similarities between the law of possession in Louisiana and Rome. To probe these similarities more deeply, some exposition of the law of possession is required.

Possession has been vitally important in the history of Western law. In Oliver Wendell Holmes's *The Common Law*, possession and ownership are treated in the same forty-page Lecture.<sup>38</sup> The treatment of ownership consists of two of those forty pages.<sup>39</sup> Holmes states, with little elaboration, that the "rights of [ownership] . . . are substantially the same as those incident to possession."<sup>40</sup> Why protect possession without ownership? That question, says Holmes, "has much exercised the German mind."<sup>41</sup> Some of the philosophical complications that stimulated the German thinkers will be explicated below. These complications are important to an understanding of the intent element of possession under Roman and early Louisiana law.

The first step in understanding Roman law is recognizing the difficulty of the task. The last law that will be examined from the Roman period will come from the Justinian legislation, which was promulgated, for the most part, during the first half

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38. See OLIVER W. HOLMES, *THE COMMON LAW* 206-46 (1881).

39. See *id.* at 245-46.

40. *Id.* at 246.

41. *Id.* at 206.

of the sixth century C.E. Extant Roman law texts are good but fragmentary. To complicate the task further, Roman law has been the subject of much thought, speculation, and gloss over the centuries. These interpretations cannot be ignored in the name of going back to the original texts, because we do not have all of the original texts. We need the historians and philosophers in order to understand what the Roman law meant.

The path is more tortuous because of the vitality of the Roman law itself during the ancient period. As noted above, much of the Institutes of Justinian were taken from the Institutes of Gaius.<sup>42</sup> Gaius lived from about 110 C.E. until at least 179.<sup>43</sup> The Institutes of Justinian were put together about 400 years later—a considerable period from any civilization's reckoning. In that time, much had changed, and much was about to change more drastically under the Justinian legislation. For instance, one of the most important legal consequences of possession was the availability of possessory interdicts to protect that possession.<sup>44</sup> Because of a change in procedure,<sup>45</sup> a new remedy provided by the *constitutiones*<sup>46</sup> called the *actio momentariae possessionis* rendered the interdicts superfluous.<sup>47</sup> Yet both the interdicts and the later *actio* were important to Roman law, and the interdicts cannot be ignored because they were replaced. The Roman period is a long one, and it is not generally helpful to assume that Roman law was embodied in either Gaius, the Justinian legislation, or the law at the fall of the Eastern Roman Empire in 1453.<sup>48</sup> The task of examining Roman law, then, is complex, but it is not impossible.

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42. See *supra* note 4 and accompanying text.

43. See Gordon & Robinson, *supra* note 4, at 9.

44. See *infra* part III.B.2.

45. See H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 458-59 (1939).

46. These were laws enacted by the Roman Emperor himself, in the form of *decreta*, *edicta*, and *rescripta* or *epistolae*. The *constitutiones* of importance here were considered controlling precedent throughout the Empire. BLACK'S LAW DICTIONARY 312 (6th ed. 1990).

47. See SAVIGNY, *supra* note 15, at 361.

48. This Article, however, will not consider the law of the later Eastern Roman Empire, generally known as the Byzantine Empire, after Justinian. The redactors of the Louisiana Code of 1808 probably did not consider it part of the Roman period. In any case, it does not appear that post-Justinian Byzantine law influenced the early Louisiana Codes, and for that reason, this Article will ignore later Byzantine law.

*B. Rudiments of the Roman Law of Possession Compared with Their Louisiana Counterparts*

The scheme for this subpart is first to explain basic concepts in the Roman law of possession. After each concept is explained, its twin in the Louisiana Civil Code of 1808 and the Louisiana Code of Practice of 1825 will be presented. After the Roman and Louisiana provisions are compared, the ways in which the law of possession in Louisiana followed the Roman law will become even plainer.

1. Types of *Possessio*

There are several types of possession at Roman law, perhaps the most important of which is good faith possession, generally known as *bonae fidei possessio* (the shortened form of *bonae fidei possessio in via usucapiendi*).<sup>49</sup> A good faith possessor at Roman law is one who thinks that there are lawful grounds for his possession, usually a just title.<sup>50</sup> A bad faith possessor, or *malae fidei possessor*, possesses as owner even though he knows that he is not the true owner. Louisiana law employed these same definitions:

There are two sorts of possessors, those who possess <in good faith>,<sup>51</sup> and those who possess <in bad faith>.<sup>52</sup>

The <good faith> possessor is he who is truly master of the thing which he possesses or who has just cause to believe that he is so, although it may happen in effect that he is not; as it happens to him who buys a thing which he thinks belongs to the person whom he buys it of, and yet belongs to another.

The <bad faith> possessor is he who possesses as master, but who assumes this quality when he knows very well either that he has no title to the thing or that his title thereto is vicious and defective.<sup>53</sup>

*Possessio* or possession is distinguished from *detentio* or

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49. See NICHOLAS, *supra* note 11, at 128 n.2.

50. See SAVIGNY, *supra* note 15, at 67. Louisiana used the same definition for just title as Roman law: "A just title is one by virtue of which property may be transferred, such as a sale, a donation and the like, though such title may not in reality give a right to the estate possessed." LA. CIV. CODE art. 3.20.68 (1808).

51. The official English version translates "*de bonne foi*" as "honestly and fairly." I have inserted, in angle brackets, what I consider to be a more appropriate translation.

52. The official English version translates "*de mauvaise foi*" as "knavishly." I believe that my bracketed translation is more appropriate.

53. LA. CIV. CODE art. 3.20.21 (1808).

*naturalis possessio*,<sup>54</sup> which is mere detention, unprotected by possessory interdicts.<sup>55</sup> On the other end of the spectrum, *possessio* accompanied by the requisites for *usucapio*<sup>56</sup> is generally *civilis possessio*.<sup>57</sup> When all of these requisites are met, it is called *possessio ad usucapionem*.<sup>58</sup> Possession not quite reaching the level of *civilis possessio* may still merit possessory protection through interdicts; this is called *possessio ad interdicta*.<sup>59</sup>

Physical control, though more than mere detention, was sometimes called *justa possessio* when the possession was justifiable and not tainted by *vitia possessionis* (the Roman vices of possession). For example, one who possessed pursuant to a contract of pledge might be said to exercise *justa possessio*.<sup>60</sup> Analytically, *justa possessio* is closer to detention than to *possessio*, because it does not include the necessary intent. Nevertheless, for practical reasons this form of *possessio* was recognized at least theoretically and was sometimes even protected by interdicts. The converse of someone's exercising possession pursuant to a contract is the party on the other side of the contract. Generally, that person is understood to possess through his contractual partner. Thus, a lessor possesses through his lessee, who possesses for the lessor. The lessor's possession was called *possessio corpore alieno*.<sup>61</sup> The lessee was said to be *in possessione nomine alieno*.<sup>62</sup> This theoretical problem and the early Louisiana provisions dealing with it are discussed more fully below.<sup>63</sup>

## 2. *Interdicta*

Once someone has a form of *possessio* that the law will recognize, there are two legal consequences.<sup>64</sup> One is *usucapio*,<sup>65</sup>

54. See SAVIGNY, *supra* note 15, at 39.

55. See W.A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE 342 (4th ed. 1903). Some exceptions are given in the Digest of Justinian. See DIG. 43.16.1.9-10 (Ulpian, Edict 69).

56. See *infra* part III.B.3.

57. See HUNTER, *supra* note 52, at 342. For an exception, see DIG. 41.2.24 (Javolenus, Letters 14).

58. See SAVIGNY, *supra* note 15, at 40.

59. See *id.* at 39.

60. See *id.* at 65-67.

61. See A.N. YIANNPOULOS, PROPERTY § 312 (2 LOUISIANA CIVIL LAW TREATISE 3d ed. 1991).

62. See J.L. Barton, *Animus and possessio nomine alieno*, in NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY, *supra* note 15, at 43, 45.

63. See *infra* part III.B.5.

64. SAVIGNY, *supra* note 15, at 5-7 (collecting contrary authority as well).

65. See *infra* part III.B.3.

and the other is protection of possession in the form of possessory interdicts. The *interdictum* was a procedure by which a possessor could keep someone else from interfering with his possession. In this procedure, ownership and title were irrelevant. The requisites for maintaining a possessory interdict could be broken into two elements: (1) legal possession, and (2) freedom from the vices of possession. The *interdictum* lay against only the immediate dispossessor and not against his successor or someone who later dispossessed the dispossessor.<sup>66</sup>

The Louisiana law was similar. Between two people claiming possession in a possessory action, ownership and title were irrelevant, as the 1808 Code<sup>67</sup> and 1825 Code of Practice<sup>68</sup> say. Those who had the right to possess, equivalent to the Roman *jus possessionis*, "ought to be maintained in their possession and enjoyment of the thing."<sup>69</sup> This right to possess was the substantive right afforded procedural protection by the possessory action, which was a nominate real action protecting possession of immovables and real rights therein, whether the possessor had been evicted or merely disturbed in possession.<sup>70</sup> (Slaves were considered immovable property for these purposes,<sup>71</sup> just as they were considered *res mancipi* at Roman law.<sup>72</sup>)

A true owner could not be ousted by a mere possessor, however, in either Roman or Louisiana law. The owner's remedy in Roman times was the *vindicatio*, by which the owner could recover the property upon proving ownership. Ownership was often nearly impossible to prove, though, so a possessory interdict was by far preferable to the *vindicatio*. That proving ownership was no easy task is apparent from the epithet commonly applied to it, *probatio diabolica*,<sup>73</sup> the devil's proof. Further-

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66. See NICHOLAS, *supra* note 11, at 108-09. The vices of possession will be discussed below. See *infra* notes 86-92 and accompanying text. There was an exception in classical law to the rule that an *interdictum* lay only against an immediate dispossessor. See NICHOLAS, *supra* note 11, at 108 n.1.

67. LA. CIV. CODE art. 3.20.26 (1808) ("[w]hich of the two shall be maintained in the possession, ought to be instructed and decided without examining [sic] into the right of <ownership>. For the discussion of the titles necessary for deciding the right of <ownership>, demands often delays."). "Ownership" is my translation of the French *propriété*. The official English version uses the word "property."

68. LA. CODE PRAC. arts. 53-55 (1825).

69. LA. CIV. CODE art. 3.20.24 (1808).

70. LA. CODE PRAC. arts. 6, 46 (1825).

71. *Id.* art. 46.

72. See NICHOLAS, *supra* note 11, at 105.

73. See *id.* at 116 n.2, 155; A.N. YIANNPOULOS, PROPERTY § 185 (2 LOUISIANA

more, the defendant in the *vindicatio* would be determined by the winner of the possessory interdict.<sup>74</sup>

Louisiana law has the same effect. The Code of 1808 provides that the possessor is presumed to be owner: "until it be proved that the possessor is not the right owner, the law will have him, by the bare effect of his possession, to be considered as such . . . until the true owner makes out his right."<sup>75</sup> Thus, in Roman law, a possessor, if dispossessed or disturbed by someone claiming ownership, could provoke an *interdictum*. If he prevailed as plaintiff in the *interdictum*, the person claiming ownership would be obliged to prove his ownership in the *vindicatio*. In Louisiana, identical rules apply. Just substitute the words "possessory action" for *interdictum* and "petitory action" for *vindicatio*. In fact, later Roman law had already made these substitutions by the time of Justinian's legislation because of a change of procedure.<sup>76</sup>

There were several kinds of *interdicta*.<sup>77</sup> The *interdictum utrubi* could be used to protect all movables.<sup>78</sup> The plaintiff was required to prove that he had juridical, but not necessarily *civilis*, *possessio* and that he had exercised that possession during the current year for a longer period than the defendant, "without force, stealth, or licence" from the defendant.<sup>79</sup> The possession exercised by a party's author in title or someone exercising possession through the party was included in the calculation,<sup>80</sup> so the way in which possession was acquired was important, as it

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CIVIL LAW TREATISE 2d ed. 1980) (*probatio diabolica*); *id.* § 192 (title "good against the world") (applying the term to Louisiana law).

74. See NICHOLAS, *supra* note 11, at 109.

75. LA. CIV. CODE art. 3.20.23 (1808).

76. See *supra* note 45 and accompanying text.

77. See J. INST. 4.15. Savigny discusses the various *interdicta* in esoteric detail in Book IV of his *Treatise on Possession*. See SAVIGNY, *supra* note 15, at 366-89. He is particularly concerned with their relation to *actiones*, a more common Roman remedy. While interesting theoretically, these considerations are beyond the scope of this Article.

78. J. INST. 4.15.4a. Only slaves were mentioned in the actual law establishing the *interdictum utrubi*, SAVIGNY, *supra* note 15, at 314-15, but this *interdictum* seems to have been applied to movables of all types, see J. INST. 4.15.4a; SAVIGNY, *supra* note 15, at 314-15. Other *interdicta* could be used to protect the possession of movables under certain circumstances, but these were of less general importance than the *interdictum utrubi*, and this Article will forgo discussing all of them.

79. J. INST. 4.15.4a. The reference to "force, stealth, or licence" will be explained immediately below.

80. *Id.* at 4.15.6. For instance, if Quintus sells Sextus an estate, Quintus is Sextus's *auctor* or author in title.

was with the other common interdicts.<sup>81</sup>

The *interdictum utrubi* and the other interdicts protecting movables are the only ones that did not have a parallel under the Code of Practice of 1825. The Code of Practice refused possessors of movables the same protection allowed possessors of immovables, although it did consider slaves immovable for this purpose.<sup>82</sup> Eventually Louisiana law would change to follow the Roman more closely, allowing possessory protection to a possessor of movables through an innominate real action.<sup>83</sup>

For immovables there were several important *interdicta* at Roman law. The *interdictum uti possidetis*<sup>84</sup> was used for evictions or disturbances of possession that were less than evictions.<sup>85</sup> The plaintiff would prevail as long as his own possession was not tainted by vice.<sup>86</sup> Except for the *interdicta utrubi* and *uti possidetis*, the main forms of *interdicta* were directly linked to various vices of possession. The vices were force (*vi*); clandestinity or stealth (*clam*); and precariousness (*precario*), that is, pursuant to a license.<sup>87</sup> Possession did a possessor no good<sup>88</sup> against someone toward whom his possession was vicious. For instance, if Quintus gained his possession by forcibly evicting Sextus, Quintus's possession would be vicious in relation to Sextus. Vices of possession, however, are relative, so that Quintus's possession would be effective in relation to Septimus, a stranger.<sup>89</sup> The vices of possession, which could prevent someone from acquiring ownership by acquisitive prescription, were largely the same under early Louisiana law. Possession had to be "continued, uninterrupted, peaceable, public and unequivocal," essentially the same as nonviolent,<sup>90</sup> nonclandestine, and nonprecarious,<sup>91</sup> or in Justinian's legislation, "nec vi nec

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81. SAVIGNY, *supra* note 15, at 315. The importance of how one acquired the right to possess, or *jus possessionis*, became less important by the time of Justinian. *Id.*

82. See LA. CODE PRAC. art. 46 (1825) (slaves treated as immovables); *id.* art. 60 (possessory action did not lie for possessors of movables).

83. See YIANNPOULOS, *supra* note 61, § 308.

84. See J. INST. 4.15.4a.

85. See SAVIGNY, *supra* note 15, at 310.

86. See *id.* at 313.

87. J. INST. 4.15.4a.

88. *Id.*

89. See NICHOLAS, *supra* note 11, at 108-09. The ancient maxim was, "'Adversus extraneos etiam vitiosa possessio prodesse solet' (against third persons even a 'vicious' possession is effective)." *Id.* at 108-09 n.2.

90. "A possession by violence not being legal, does not confer the right of prescribing as long as said violence continues." LA. CIV. CODE art. 3.20.41 (1808).

91. "The circumstance of having been in possession by the permission or through the

clam nec precario."<sup>92</sup>

The *interdicta retinendae possessionis* protect possessors against violent attacks on their possession. These *interdicta* could be used to remedy a disturbance, or even to prevent an anticipated disturbance. They could also be used in a *rei vindicatio* to determine the legal status of alleged possession, that is, whether possession was marred by violence.<sup>93</sup> The *interdictum de vi* was the classical interdict used when possession of an immovable was lost by violence.<sup>94</sup> The plaintiff had to prove: his possession at the time of the eviction, a forcible disturbance (*atrox vis*) possession which rendered possession impossible, that the violence was committed by the defendant himself, that the possession was lost by the act of violence, and that the subject of the possession was immovable.<sup>95</sup>

Other interdicts were linked to other vices of possession. The appropriate interdict when stealth was involved was the *interdictum de clandestina possessione*. The plaintiff had to prove that his juridical possession was lost because the defendant acquired his possession "behind the back" of the plaintiff. Similarly, when the defendant's possession was precarious, the *interdictum de precario* would lie. Although this is the only important classical interdict for an immovable that no longer lies under current Louisiana law,<sup>96</sup> the action did lie in Louisiana until the 1982 revision of the Civil Code. Until then, the classical Roman interdicts had their equivalents under Louisiana law in the possessory action. Instead of legislating separate possessory actions linked to the various vices of possession, though, the Code of Practice of 1825 and the Civil Code of 1808 created a single possessory action that applied to all vices.<sup>97</sup>

### 3. *Occupatio, Usucapio, and Praescriptio*

Possession, in addition to affording a possessor access to an

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indulgence of another person, gives neither legal possession nor the right of prescribing. Thus those who possess precariously . . . possess for [the master]." *Id.* art. 3.20.40; see also LA. CODE PRAC. art. 48 (1825) (Precarious possessors "are not entitled to the possessory action.").

92. J. INST. 4.15.4a.

93. See SAVIGNY, *supra* note 15, at 301.

94. See J. INST. 4.15.6.

95. See SAVIGNY, *supra* note 15, at 325-33.

96. There is an exception when the adverse party is the person from whom the possessor derives his right.

97. See LA. CODE PRAC. ch. 3, § 2 (1825); see also LA. CIV. CODE bk. 3, tit. 20 (1808).



*interdictum* or a possessory action, had a second important legal consequence: by *occupatio* or *usucapio*, and later by *praescriptio*, it could lead to ownership. *Occupatio* allowed the taker of something that belonged to no one (that something being called a *res nullius*) to own it immediately.<sup>98</sup> In this area the Louisiana Code of 1825 matches the Institutes of Justinian very closely, almost verbatim in places. Because *occupatio* has been discussed above at some length, this Article will not treat it further here.<sup>99</sup>

As for *usucapio*, although it is simply understood as a civil-law system of acquisitive prescription,<sup>100</sup> originally its main purpose was to cure technically deficient titles. As an example of the importance of *usucapio*, the case of the bonitary owner is helpful. In classical Roman law a thing was classified as *res Mancipi* or its opposite, *res nec Mancipi*. The difference, for present purposes, is that *res Mancipi* could not be conveyed by the common *traditio*, but instead had to be conveyed by a formal method such as *mancipatio*, a more ritualistic and difficult method of conveyance. Romans often attempted, however, to convey *res Mancipi* by *traditio*, resulting in a technically deficient title in the buyer.<sup>101</sup> This defect could be cured by *usucapio*.<sup>102</sup>

*Usucapio* is a very old institution of Roman law. Defined by the Twelve Tables<sup>103</sup> around 450 B.C.E., it was limited to Roman citizens and things capable of Roman ownership.<sup>104</sup> *Usucapio* required that possession be uninterrupted for the required period,<sup>105</sup> that possession be acquired *ex iusta causa* or

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98. J. INST. 2.1.12.

99. See *supra* part II for discussion of *occupatio*.

100. See NICHOLAS, *supra* note 11, at 122.

101. A buyer in this particular circumstance is called a bonitary owner, because although he did not have full, Quiritarian ownership of the thing conveyed by *traditio*, it was understood to have entered his estate, or to be *in bonis*.

102. This illustration comes from NICHOLAS, *supra* note 11, at 123-25.

103. *Id.* at 105, 122.

104. See J. INST. 2.6. For a more complete explanation, see G. Inst. 2.65 (although I do not argue that the Louisiana redactors relied on Gaius). The Roman law distinguished between the *ius civile*, which applied only to Roman citizens, and the *ius gentium*, which applied to all peoples. Advantages of the *ius civile* were among the reasons that various groups agitated throughout Roman history for Roman citizenship. It was eventually extended to all people in Italy, and later extended even further.

Roman or Quiritarian ownership could only be achieved over certain things. The most important thing capable of Quiritarian ownership was Italian land; later, however, the privilege of the *ius italicum* was extended to certain parts of the Empire, and things within a place enjoying the *ius italicum* were capable of Roman ownership. See *id.*

105. Under the Twelve Tables, one year was required for movables and two for immovables. See NICHOLAS, *supra* note 11, at 122.

*iustus titulus*,<sup>106</sup> that the possessor be in good faith,<sup>107</sup> that the thing be capable of ownership,<sup>108</sup> and that the thing never have been stolen or taken by force, unless in the meantime it had been returned to the owner, or unless the owner could have recovered the thing but failed to do so.<sup>109</sup>

The plaintiff had to prove all of these elements except good faith, which was presumed in Roman law, as it is in Louisiana law.<sup>110</sup> The defendant had the burden of proving bad faith at the time of the acquisition of possession. Supervening bad faith (e.g., a buyer's discovering after acquiring possession that his transferor's title was bad) was not an obstacle to *usucapio*.<sup>111</sup> Louisiana had the same rule.<sup>112</sup> Also at Roman law, as under Louisiana law, good faith was required for *usucapio* or prescription, respectively, but not for the possessory protection of an *interdictum* or possessory action.<sup>113</sup>

These parallels between Roman and Louisiana law are straightforward. To understand the derivation of the Louisiana law of prescription, though, we must examine the evolution of this institution in Rome. In time, the most efficient action for a possessor *in via usucapiendi* was the *actio Publiciana*, or Publician action. This was essentially a *vindicatio* that presumed the necessary lapse of time for *usucapio*; the plaintiff had to prove the other elements for *usucapio*, except good faith. He would prevail unless the defendant asserted the *exceptio iusti dominii* (exception that he was the true owner<sup>114</sup>). If the defendant prevailed on his exception, he would win, unless plaintiff asserted the *replicatio rei venditae et traditae*. This would allow the plaintiff to win if he were a mere bonitary owner, even if the

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106. Loosely translated "for just cause," this requirement could be met by a bonitary owner because he had received title through a colorable, but technically invalid conveyance. Exactly what could constitute just cause is a complicated issue that is not relevant here.

107. In Latin, *bonae fidei possessio in via usucapiendi*.

108. For example, not a free man.

109. See NICHOLAS, *supra* note 11, at 123. The Romans had a wider definition of theft than applies in modern times, but land could never be considered stolen. It could be taken by force, however. *Id.*

110. *Id.* For the Louisiana equivalent, see LA. CIV. CODE arts. 3.20.39, .71 (1808).

111. See NICHOLAS, *supra* note 11, at 122-23.

112. LA. CIV. CODE art. 3.20.72 (1808).

113. On Roman law, see HUNTER, *supra* note 55, at 341. On Louisiana law, see LA. CODE PRAC. art. 49 (1825) (bad faith possessors allowed to bring possessory action), and LA. CIV. CODE arts. 3.20.66-72 (1808) (good faith required for all but thirty-year prescription).

114. That is, that he was *dominus ex iure Quiritium*.

defendant were the Quiritarian owner. In this way, the Publician action turned the bonitary owner into a Quiritarian owner in everything but title.<sup>115</sup>

Originally, the bonitary owner and the good faith possessor only had the possessory interdicts for protection on their way to *usucapio*. Then, some time in the late Republic, the praetor protected the bonitary owner against everyone but the true owner. Eventually, when the praetor (again probably in the late Republic) instituted the *exceptio* and *replicatio rei venditae et traditae*, the bonitary owner could protect himself on his way to achieving *usucapio*, even against the Quiritarian owner.<sup>116</sup>

The next development occurred around 199 C.E., when we find the first existing mention of *longi temporis praescriptio*. This device began as a limitation on actions, similar to common-law adverse possession statutes, but by the time of Justinian, it became an actual mode of acquisitive prescription. The applicable time periods were ten years if the parties lived in the same district; otherwise, the prescriptive period was twenty years. This institution arose because of the limits on *usucapio*, particularly that it could be applied only to things capable of Roman ownership. By the time of Justinian, except for the brief period of reconquest, the Roman Empire no longer included Italy. Other than in places enjoying the *ius italicum*, therefore, *usucapio* could only apply to movables.<sup>117</sup>

Louisiana, tracing the Roman path, adopted a version of *longi temporis praescriptio*. The Code of 1808 allowed a possessor in good faith and with just title to acquire an immovable by prescription after ten years if the true owner lived in the territory, and after twenty years if the owner lived abroad.<sup>118</sup> Louisiana apparently followed Rome exactly.

Although the Roman system protected ownership more than any modern system, the Roman praetor and emperor found this protection too restraining. Justinian added the *longissimi temporis praescriptio*, acquisitive prescription after thirty years. *Iusta causa* and a thing's status as stolen were irrelevant; only good faith was required. Louisiana once more followed the Roman path but strode one step farther. The Code of 1808

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115. See NICHOLAS, *supra* note 11, at 126-27.

116. *Id.* at 125.

117. *Id.* at 128-29. For a discussion of the public policies involved, see *id.* at 104-05. See also *supra* note 104.

118. LA. CIV. CODE art. 3.20.27 (1808).

allowed acquisitive prescription of immovables after thirty years, even if the possessor were in bad faith and had no just title. The vices of possession could still be pleaded by the defendant. Thus, Louisiana omitted one Roman requirement: good faith. Otherwise, the Louisiana and Roman laws were the same.

#### 4. Derivative Possession

Possession did not have to be acquired by the present possessor but could be acquired through an agent, a slave, or others. Where positive Roman law specifically allowed it, one possessor could transfer his possession to another.<sup>119</sup> Some contracts allowed the transfer of the right to possess (*jus possessionis*), such as in pledge and emphyteusis. Others, however, never involved transfers of the *jus possessionis*, such as in lease or loan (*commodatum*).<sup>120</sup>

The Louisiana law has fully embraced the concept of derivative possession. Louisiana law still recognizes it as an idea in itself,<sup>121</sup> which is also used to ground the concept of "tacking of possession." Tacking allows Quintus to transfer his possession to Sextus, whether Sextus is a universal successor or not. As the Code of 1808 explains:

If a possessor chanches to die before he has acquired the prescription and his heir continues in possession, we join together the time of the possession of the one and the other and the prescription is acquired to the heir after the possession of his ancestor and his own joined together, have lasted the time regulated for prescribing.

And the same thing holds in the possession of the buyer joined to that of the seller to whom he succeeds, and in the possession of the donee and donor, of the legatee and testator, and in the same manner of all those who possess successively, having right the one from the other[.]<sup>122</sup>

. . . where they follow one another without interruption.<sup>123</sup>

Derivative possession has become particularly important following the 1982 revision of the possession articles because precarious possessors are now accorded possessory protection.<sup>124</sup>

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119. See SAVIGNY, *supra* note 15, at 80-81.

120. *Id.* at 205-24 (going into much more detail than is necessary here).

121. See YIANNPOULOS, *supra* note 61, § 310.

122. LA. CIV. CODE art. 3.20.43 (1808).

123. *Id.* art. 3.20.44.

124. Precarious possessors may now maintain a possessory action. YIANNPOULOS, *supra* note 58, § 300 & n.2.

5. Precarious "Possession"<sup>125</sup>

At Roman law, someone detaining a thing pursuant to a contract generally had mere detention, not possession. Such persons were understood to exercise possession for the owner, who exercised his possession through a tenant, for example. There were, however, some exceptions for the sake of convenience. Both the pledgee and the *sequester* (someone who held a thing that was subject to a dispute until the dispute was resolved) were considered to have legal possession. In a contract such as pledge, having the right to possess was essential for the pledgee to maintain his security; otherwise, detaining the object would have been nearly useless given the purpose of the agreements involved.<sup>126</sup> Similarly, the *sequester* could not easily hold the object secure without having the right to possess. These cases are exceptional, however. Most detainers generally did not have possession because they could not have the requisite intent. The positive law simply dispensed with the intent requirement in some special cases.<sup>127</sup>

Louisiana has followed a similar approach. As the Code of 1808 recognized, "One may possess a thing not only by one's self, but also by other persons."<sup>128</sup> The Code gives some examples: "[T]he proprietor of a house or other tenement, possesses by his tenant or by his farmer; the minor by his tutor or curator, and in general every proprietor by the persons who hold the thing in his name."<sup>129</sup> Originally, the precarious "possessor" was not accorded any possessory protection.<sup>130</sup> The Code of

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125. The term "precarious possession" does not denote possession in the juridical sense. The reference to "precarious" comes from the Roman contract of *precarium*, a usually gratuitous loan of land, which would last forever, with the enormous exception that it was subject to revocation by the grantor at any time. It is ironic that precarious possession, which until ten years ago signalled the absence of possessory rights in Louisiana, is named after the *precarium*. The Romans understood that the *jus possessionis*, or right to possess, was transferred in the contract *precarium* absent an express agreement to the contrary. DIG. 9.4.22.1 (Paul, Edict 2); SAVIGNY, *supra* note 15, at 221-24; YIANNPOULOS, *supra* note 61, § 319. The use of the word "precarious" does make sense in terms of *precario*, the vice of possession, which would have defeated a tenant in Rome but generally not someone holding a *precarium*.

126. See NICHOLAS, *supra* note 11, at 110-12 & 112 n.1.

127. The Digest did make the necessary dispensations. E.g., DIG. 9.4.22.1 (Paul, Edict 18) (*pignus* and *precarium*); 43.24.12 (Venuleius, Interdicts 2) (limited protection for a tenant farmer to regain his crops); see also HUNTER, *supra* note 52, at 341.

128. LA. CIV. CODE art. 3.20.18 (1808).

129. *Id.*

130. See YIANNPOULOS, *supra* note 61, § 300.

1808, in no fewer than three articles, made this clear,<sup>131</sup> as did the Code of Practice of 1825.<sup>132</sup> In the 1982 revision, however, precarious possessors were given the benefits of possession against everyone except the person from whom they derived their rights of possession.<sup>133</sup> This innovation appears to have been brought about for reasons of convenience, as in Rome.

*C. Some Problems in the Law of Possession: Roman Treatment and Louisiana Treatment*

What has been discussed above is largely susceptible of black-letter definition. Not everything in the law of possession is so straightforward, however, and the ways in which the Roman lawyers and the Louisiana redactors handled these problems, and the ways that the Louisiana redactors followed the Roman lawyers, are enlightening. Perhaps the most famous of these problems is the intent element of possession. Another is the treatment of incorporeals.

A real right other than ownership, an incorporeal such as the right of passage, cannot be physically possessed in the same way that a tract of land can be physically possessed. On a tract of land someone can build a fence and plant crops and the *corpus* of possession is established easily enough. But what about a servitude of passage? Whether such rights should be afforded the legal advantages of corporeals troubled Roman lawyers. Gaius thought incorporeals could not be possessed, because they could not be touched; thus, the physical element of possession could not be satisfied. Later, however, Gaius's approach was abandoned as possessory protection was allowed for many holders of servitudes. The second section below will examine how Roman law and Louisiana law evolved in addressing this problem.

The element of intent presented other problems. Indisputably, possession required some intent in addition to the exercise of physical control—the famous *animus* in addition to the *corpus*. The quality of this *animus*, however, has been hotly debated. No one knows exactly what the Romans required. The next sec-

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131. LA. CIV. CODE arts. 3.20.45-.47 (1808).

132. LA. CODE PRAC. art. 48 (1825) (Precarious possessors "are not entitled to the possessory action.").

133. See LA. CIV. CODE ANN. art. 3440 (West Supp. 1991); YIANNOPOULOS, *supra* note 58, § 300 & n.2.

tion will explore how various thinkers have approached the issue and what the Louisiana redactors concluded.

### 1. Intent

As we have seen, the mere fact of detaining a thing was not sufficient to constitute juridical possession. The first element, certainly, was the exercise of some control, usually actual physical control. This idea is relatively simple, although actual contact with the subject of possession was not necessary.<sup>134</sup> This generally physical element is called the *corpus* or the *factum* of possession.<sup>135</sup> Friedrich K. von Savigny, perhaps the most important of the modern writers on possession, defines the *corpus* as "the immediate power of dealing with a subject,"<sup>136</sup> which "is founded on the state of consciousness of unlimited physical power."<sup>137</sup> The *corpus* "need not be . . . a present immediate power, but it is sufficient if the relation of immediate dominion over the thing can be *reproduced* at will, and the Possession is only then lost, when the power to deal with it at will is altogether gone."<sup>138</sup> This is the generally accepted definition of the *corpus* of possession, and no one to my knowledge has seriously disputed it since Savigny explained it.

The second element of possession was intent, or the *animus* of possession. According to the Digest, possession is acquired by acts of the body and the mind, but neither the mind alone nor the body alone will suffice.<sup>139</sup> " 'One acquires possession' . . . 'by an act of the mind and an act of the body (*animo et corpore*).' "<sup>140</sup> Several theories have been proffered to explain the intent element. Savigny, who articulated the theory that is the most often discussed, said that the *animus possidendi* must amount to more: it must be the *animus domini* or the *animus sibi habendi*, that is, the intent to be owner, or the intent to have the thing as one's own.<sup>141</sup> This intent means "dealing . . . as an owner is accustomed to do," which a robber can do, but a tenant

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134. DIG. 41.2.1.21; HUNTER, *supra* note 55, at 343.

135. See SAVIGNY, *supra* note 15, at 142.

136. *Id.* at 169.

137. *Id.* at 170.

138. *Id.* at 253-54 (citation and footnote omitted).

139. DIG. 41.2.3.1 (Paul, Edict 54) ("*Apiscimur possessionem corpore et animo; neque per se animo, aut per se corpore*").

140. NICHOLAS, *supra* note 11, at 112.

141. SAVIGNY, *supra* note 15, at 71-72. Savigny cites Theophilus for the proposition, admitting that it is only implied in the Institutes and the Digest. *Id.* at 73 n.(e).

cannot.<sup>142</sup> This intent should not be confused with the *opinio domini*, the belief that one is owner—such a belief is not required.<sup>143</sup>

Not everyone accepts the *animus domini* definition of intent. The controversy is mired in the mud of philosophy. As Holmes said, “[t]he theory [of possession] has fallen into the hands of the philosophers, and with them has become a cornerstone of more than one elaborate structure.”<sup>144</sup> Bringing the subject of possession within the will of the possessor was essential to bringing legal possession doctrine into the framework of Kantian and Hegelian notions. Both philosophical systems rested on a respect for individual will,<sup>145</sup> and they conceived of legal protection of possession as part of the respect for individual will.

Holmes took issue with this view of the individual will, saying that the common law was sensible in only requiring an intent to exclude others from the subject of possession. The common law, said Holmes, did not require an intent to be owner, or *animus domini*.<sup>146</sup> Planiol and Ripert also define *animus* somewhat differently from Savigny, saying that “[p]ossession is a state of fact which consists in the detention of a thing in an exclusive manner and in the performance on the thing of the material acts of use and enjoyment as if the possessor were owner.”<sup>147</sup>

Savigny’s “subjective theory of possession”<sup>148</sup> probably had its most famous opponent in Rudolf Jhering.<sup>149</sup> Jhering concentrated on the factual aspects of possession, generally inferring

142. *Id.* at 73.

143. *Id.* at 177.

144. HOLMES, *supra* note 38, at 206.

145. *See id.* at 209.

146. *Id.* at 206-34. Special attention should be paid to the text on page 219.

147. 3 M. PLANIOL & G. RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* 158 (2d ed. 1952), *quoted in* YIANNPOULOS, *supra* note 61, § 301 n.5. This Article is not concerned with the question whether possession is a “state of fact,” as asserted by Planiol and Ripert, a right, or a mixture of the two, but this issue has been disputed and discussed at length by the possession theorists. *See, e.g.,* NICHOLAS, *supra* note 11, at 114-15; SAVIGNY, *supra* note 15, § 5. The redactors of 1808 decided that it was a mixture of the two. LA. CIV. CODE 3.20.19 ¶ 2 (1808).

148. YIANNPOULOS, *supra* note 61, § 302.

149. *See generally* RUDOLPH JHERING, *UEBER DEN GRUND DES BESITZESCHUTZES* (Jenn, Hante’s Berlay 1869). This work has been translated into Italian, for example, SUL FONDAMENTO DELLA PROTEZIONE DEL POSSESSO (F. Forlani trans., Milan, Vallard 1872). The French version of JHERING, *RÔLE DE LA VOLONTÉ DANS LA POSSESSION* (Meulenaere trans., 1891), is rare and unavailable. I have been unable to find an English translation.



that the requisite intent would be present when the factual elements were satisfied. He also would have looked to the cause for the possession (*causa possessionis*), opposing and contrasting a *causa detentionis*. For instance, a tenant would have a *causa detentionis*.<sup>150</sup> Jhering thought that the concept of detention grew from historical exceptions to the notion of possession; if someone satisfied the physical element of possession, and one of the historical exceptions (such as lease) did not apply, then Jhering would have found juridical possession.<sup>151</sup>

Barry Nicholas finds this interpretation "very forced,"<sup>152</sup> and Holmes considered Jhering's philosophy incorrect.<sup>153</sup> Yet Savigny's philosophy did not fare much better. Holmes considered Savigny "discredited,"<sup>154</sup> and Professor Nicholas emphasizes that Savigny's view of *corpus* and *animus* could not be found in the Roman sources.<sup>155</sup>

Louisiana, like other modern jurisdictions, has had to discern some usable legal structure in this quagmire. Luckily, the 1808 redactors struggled with the problem before the nineteenth-century philosophers thrust in their hands. The redactors seem to have followed the Roman law, or at least what appeared to be the Roman law as interpreted by Savigny and his school. The Code of 1808 requires the "intention of acquiring a right of ownership" in order to achieve ownership by occupancy,<sup>156</sup> and the prescription articles of the Code actually use the phrase "*animo Domini*"<sup>157</sup>—a verbatim parallel to Savigny's view of what the Roman possession law was. The Code of Practice seems to have continued to follow Roman law, making the possessory action available only to those "who possess as owners."<sup>158</sup>

Intent is particularly significant in the Roman and Louisiana systems because possession could be retained by intent alone, although it could not be acquired by intent alone. Retaining possession in this way was called retention *animo solo* at

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150. See YIANNPOULOS, *supra* note 61, § 302.

151. See NICHOLAS, *supra* note 11, at 113 n.1.

152. *Id.*

153. See HOLMES, *supra* note 38, at 208.

154. *Id.* at 207.

155. See NICHOLAS, *supra* note 11, at 113 n.1.

156. LA. CIV. CODE art. 3.20.1 (1808).

157. *Id.* art. 3.20.38.

158. LA. CODE PRAC. art. 47 ¶ 1 (1825).

Roman law.<sup>159</sup> Possession thus maintained was lost by *animus* when the possessor intended to give up possession—at that “moment.”<sup>160</sup> The loss of the requisite intent could be inferred from mere negligence.<sup>161</sup> Intent to abandon rendered the thing a *res nullius* at Roman law, and likewise in Louisiana the thing became a thing belonging to no one. Thus, in both systems the thing became subject to acquisition by occupancy.<sup>162</sup>

The Roman institution of maintaining possession solely by intent is also similar to the Louisiana notion of civil possession. Civil possession allows a possessor to continue to possess even though he does not continue to exercise physical control. For instance, if Quintus has the *corpus* and *animus* of possession over a tract of land, then leaves it for some time, his possession continues through maintaining the requisite intent, even though he may not be physically on the land. Civil possession, however, may be ousted by the corporeal possession of another. The article in the Code of 1808 that provided the germ of civil possession allowed the actual possessor to rest on a presumption that he had possessed from the time when he could prove his possession until the present time, unless the contrary was proved.<sup>163</sup>

In the final analysis, the Louisiana law on intent seems to have followed what the Roman law appeared to be. Certainly the Louisiana law is in line with what Savigny thought the Roman law was. The conclusion cannot be stated with more exactitude, however, because we do not know enough about what the Roman law was.

## 2. Servitudes

Servitudes, or real rights in land belonging to another person (generally referred to in Latin generically as *jura in re* or *jura in re aliena*, and more particularly as *servitudines*) show how Roman law evolved. For a Roman, only corporeal things could be owned.<sup>164</sup> According to Gaius's Institutes, it was only logical that one could not possess any incorporeal, including *jura in re aliena*,<sup>165</sup> just as one cannot possess a universality of rights

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159. See NICHOLAS, *supra* note 11, at 113-14.

160. SAVIGNY, *supra* note 15, at 266-67.

161. *Id.* at 270.

162. LA. CIV. CODE art. 3.20.10 (1808).

163. See *id.* art. 3.20.42.

164. See NICHOLAS, *supra* note 11, at 107.

165. *Id.* at 106.

(such as a succession) under current Louisiana law.<sup>166</sup> But as mentioned before, Gaius lived in the second century of the Common Era, and Roman law was to change considerably between the time that he wrote and the time that Justinian redacted Roman law in his famous legislation.<sup>167</sup>

Under Savigny's conception, servitudes could not be owned because they were not property. *Animus domini* was consequently impossible. Additionally, the *corpus* was impossible to hold physically. An analogy, however, could work. Savigny and the Romans recognized the following relation—*possessio corporis : proprietas :: possessio juris : jus in re*.<sup>168</sup> In other words, just as possession could apply to things capable of ownership (*proprietas*, property, or *propriété*), quasi-possession<sup>169</sup> could apply to rights in things (*jura in re*).<sup>170</sup> Thus, while a usufructuary did not possess the land subject to his usufruct, he did quasi-possess his usufruct.<sup>171</sup>

The usufructuary did not have all of these rights at all times in Roman law, but his lot improved steadily. Eventually, he was recognized to have a right to quasi-possess (*juris quasi possessio*) and he was given possessory protection in the form of the *utilis* interdict.<sup>172</sup> At the height of his protection, the usufructuary could take advantage of most of the chief interdicts, including the *interdicta uti possidetis, utrubi, de vi*, and *de precario*, when the usual elements of each interdict were satisfied.<sup>173</sup>

All of the more important servitudes were eventually afforded protection through interdicts. Sometimes the same interdicts that applied to possession proper could be used; for other servitudes, special interdicts were needed. When defending an action or an interdict, the holder of a servitude could win by exception as well.<sup>174</sup> Of course this protection for quasi-possessors was all contingent on the holders' ability to prove the counterparts to possession: they must have the *corpus*, meaning appropriate exercise of the servitude, and the *animus*, meaning

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166. See YIANNPOULOS, *supra* note 61, § 306.

167. See *supra* notes 43-47 and accompanying text.

168. SAVIGNY, *supra* note 15, § 25.

169. The Latin equivalents are generally *quasi possidere* (to quasi-possess) or *quasi in possessione esse* (to be in quasi-possession).

170. See SAVIGNY, *supra* note 15, at 76, 131-32 & nn.(c)-(e).

171. *Id.* § 25.

172. See NICHOLAS, *supra* note 11, at 110.

173. See SAVIGNY, *supra* note 15, § 47.

174. *Id.* § 46.

in this case the *animus possidendi* instead of the *animus domini*, to use Savigny's terminology.<sup>175</sup>

The Louisiana redactors in 1808 solved the problem of incorporeal quasi-possession in the same way that the Romans eventually did. The Code observes that "[p]ossession can be properly exercised only on corporeal things," but the Code does allow that "[t]hings incorporeal may however be said though improperly to be possessed, such as <servitudes> and the like, by that kind of possession of which they are susceptible."<sup>176</sup> The Code of Practice similarly allowed possessory protection for real rights in immovables.<sup>177</sup>

#### IV. CONCLUSION

The reader will not see here an apology for Roman law. The point of this Article is not to argue that Roman law should be studied because it remains of great practical importance in Louisiana. (Roman law should be studied for other, better reasons.) The point of this Article is to show that the redactors of the early Louisiana law relied heavily—and directly in many places—on Roman law in particular, not just the Romanist-civilian tradition. Much of this reflection of ancient Roman law remains in the current law of possession,<sup>178</sup> and much of it can be seen in other parts of the Code of 1808 (such as the parts on master and servant;<sup>179</sup> father and child;<sup>180</sup> minors, tutorship,

175. See *id.* Savigny probably meant the *animus sibi habendi*, the intent to have the right as one's own. This seems to be the assumption of the 1982 Louisiana redactors at least. See YIANNPOULOS, *supra* note 61, § 302 (referring to the "*animus rem sibi habendi* (intent to have a things as one's own)").

176. LA. CIV. CODE art. 3.20.17 (1808). The French text of the Code uses "*servitudes*"; the official English version translates it as "services," but I believe servitudes is a better translation given current usage.

177. LA. CODE PRAC. art. 47 (1825).

178. In the words of the reporter, the 1982 revision of the Louisiana law of possession "relied heavily on the provisions of the Louisiana Civil Code of 1870 and on Louisiana jurisprudence" as well as "the reservoir of the civilian tradition." YIANNPOULOS, *supra* note 61, § 300, at 582-83. The 1870 Civil Code was essentially the same as the 1825 Civil Code, minus the slavery provisions. The 1825 Code was similar to the 1808 Code; the older Code was revised somewhat, but the revision was not wholesale by any means. (The 1825 Code had sweeping language about the repeal of prior laws, but this emphatic enunciation had more to do with the unwillingness of the Louisiana Supreme Court to understand that colonial laws from the Spanish and other periods were not still in effect.) See generally *Shelp v. National Sur. Corp.*, 333 F.2d 431 (5th Cir.) (Wisdom, J.) (providing a full discussion and collecting authorities), *cert. denied*, 379 U.S. 945 (1964); Yiannopoulos, *supra* note 2.

179. See BATIZA, *Actual Sources*, *supra* note 3, at 51.

180. See *id.* at 53.

curatorship, and emancipation;<sup>181</sup> things and estates;<sup>182</sup> and usufruct, use and habitation<sup>183</sup>), most of which also appear in different incarnations in the present Civil Code. Louisiana's claim to take directly from the Roman legacy is a good one.

I would be in bad faith, and indeed knavish (to use the 1808 translation of "*mauvaise foi*"), if I were to assert that Louisiana's case is certain. Although it is styled a "brief," this Article is of course an exercise in historical research. Overstatement is a mistake in historical work, which is always uncertain. Part of the controversy over the sources of the 1808 Code<sup>184</sup> is rooted in the inherent problems of historical research. There can be no guarantee that the past, be it the couple of hundred years of Louisiana legal history or the several thousand years of Roman legal history, will be understood with perfect accuracy. All that honest historical work can offer is honesty, and one might hope for some intelligence. In short, responsible history can only make an honest case.

This Article makes the case that the Louisiana law of possession for the most part follows the Roman law. The Article further emphasizes that the redactors did not depend only on later sources, such as the *Siete Partidas* or French commentators, for their knowledge and use of the Roman law. The nearly verbatim reproduction of Roman provisions in the Code of 1808 shows this, particularly when compared with the variance of the *Siete Partidas* and other possible intermediate sources. The case is further strengthened because the early Louisiana law also followed general Roman methodology and doctrine. Louisiana need not take through Spain or France, at least insofar as the possession articles are concerned. For the foregoing reasons, Louisiana should be recognized as a direct successor to the Roman legacy.

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181. See *id.* at 55.

182. See *id.* at 62-63.

183. See *id.* at 65.

184. See *supra* note 3 and accompanying text.